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IN THE

Supreme Court of the United States

October Term, 1940.

No. 644.

THE H. W. GOSSARD CO.,
Petitioner,

v.

LOEBER'S, INC.,
Respondent.

Petitioner's Reply to Brief for Respondent.

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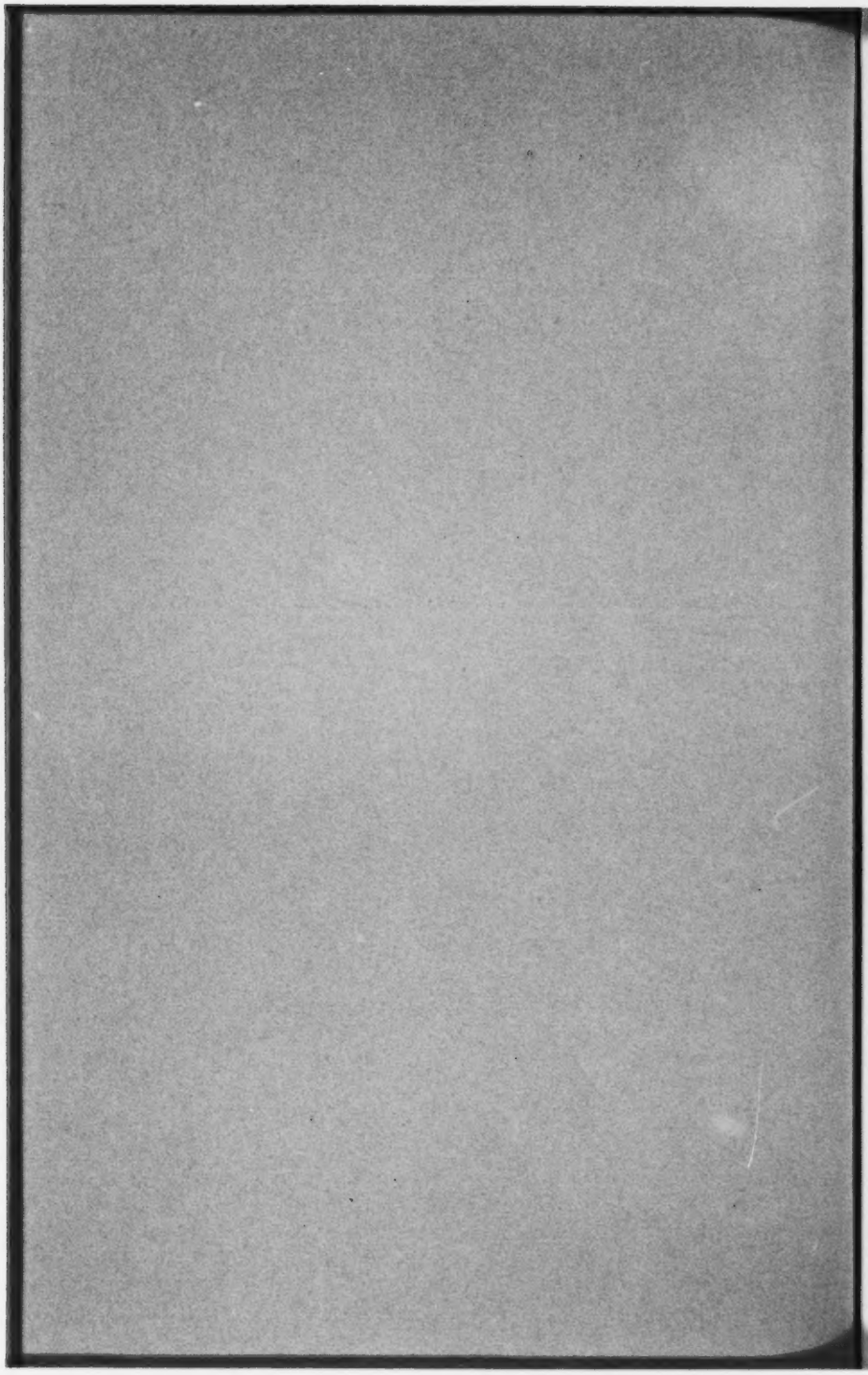

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENT.

I.

Respondent's brief does not touch any one of the grounds for allowance of the writ here asserted by petitioner.

These are:

(1) That the Court below reversed the decree of the District Court without even referring to the *fact findings* of the District Court which controlled its *ultimate conclusions,* much less adjudging *such findings* "clearly erroneous"; that in so doing the Court below disregarded and nullified the express mandatory provision of Rule 52 (a) of the Federal Rules of Civil Procedure that "*Findings of fact* shall not be set aside unless clearly erroneous"; and that the decision of the Court below thus raises an important question of fed-

eral law which has not been, but should be, settled by this Court.

This question, involving as it does the proper administration of law and procedure in every case brought before a Circuit Court of Appeals, is believed to be a question of the most immediate and widespread public importance, and one which should be passed upon and settled by this Court.

(2) That the Court below not only disregarded the findings of fact made by the District Court upon clear and uncontradicted evidence, but arbitrarily substituted for the findings of the District Court, findings of its own which are nowhere supported or justified by the evidence, and the only basis for which is found in the disclosures of the patents in suit; and that the Court below thereby rendered a decision which is not only probably in conflict with the applicable decision of this Court in *Topliff v. Topliff and Another,* 145 U. S. 156, 161, upon the same fundamental question of patent law, but which is in direct and irreconcilable conflict with the decisions of other Circuit Courts of Appeals upon the same question. *John W. Gottschalk Mfg. Co. v. Springfield Wire & T. Co.,* 74 F. (2d) 583, 586 (CCA-1); *Firestone Tire & Rubber Co. v. United States Rubber Co.,* 79 F. (2d) 948, 959 (CCA-6); *Williams Iron Works Co. v. Hughes Tool Co.,* 109 F. (2d) 500, 506 (CCA-10).

The circumstance that these questions arise in a patent infringement suit in which there is no conflicting decision of another Circuit Court of Appeals with regard to the same patents, does not, we believe, as respondent's brief seems to indicate, call for the summary refusal by this Court to pass

upon such questions in the interests of proper and uniform administration of the laws and the correction of manifest error.

With respect to the foregoing reasons relied upon by the Petitioner for allowance of the Writ, respondent states (brief p. 3) that:

> "The Court of Appeals below quite definitely indicated that it found the findings of the District Court to be 'clearly erroneous'."

Respondent, however, fails to point out by reference to the opinion of the Court below a single instance in which that Court so much as referred to any *fact finding* of the District Court with regard to either of the alleged prior art references upon which the Court below relied in holding want of invention in the Patents in suit, and Petitioner can find none. It is obvious that the Court below disagreed with the *ultimate legal conclusions* of the District Court, but that is a far different thing from the setting aside of the *findings of fact* of the District Court because "clearly erroneous".

Again, respondent seeks to minimize the findings of the District Court by stating that the findings were prepared by counsel for Petitioner and that "the District Court is purported to have made ninety-three separate findings of fact in a simple patent infringement suit involving most trivial subject matter." The first of these contentions, of course, needs no comment. With respect to the second, it need only be said that of such ninety-three findings, the greater part thereof were necessitated by various untenable arguments raised by respondent and the fact that respondent itself put in evidence some forty-two patents and publications in an attempt to show want of invention in the patents in suit, and

that while the District Court made but five findings of fact with respect to the Kops Patent and the Princette Publication, upon which the Court below relied to invalidate the patents in suit for want of invention, that Court did not make mention of, much less adjudge "clearly erroneous", even these five findings of fact or any thereof.

Petitioner does not argue (respondent's brief p. 3) that findings made by the District Court may not be assailed on appeal. Petitioner here contends only that none of such *findings* were assailed by the Court below or found "clearly erroneous".

II.

Respondent asserts (brief pp. 1, 2) that the first patent here in suit has previously been held invalid by the Court of Appeals for the Sixth Circuit in *Loeber Hair Goods Co. v. H. W. Gossard Co.*, 87 Fed. (2d) 98, because anticipated by and wanting in invention over the prior art.

Petitioner did not believe it necessary to refer to that decision in its petition or brief herein, for the reason that certain evidence which was determinative of the decision by the Circuit Court of Appeals for the Sixth Circuit in the earlier case was here established and found by both Courts below to be unreliable and false. Such evidence related to the so-called Dumont or French alleged prior art garment.

Thus, in *Loeber Hair Goods Company v. H. W. Gossard Co.*, 87 Fed. (2d) 98, 100, the Circuit Court of Appeals for the Sixth Circuit said:

> "*Given the French Garment,* it was an obvious step to sew the brassiere to the upper part of the corset instead of buttoning it thereto and to sew its end sections down along the seam of the corset, all as in the second patent to Kops, or the 'Princette' garment."

while in the case at bar, the Court below, speaking of the Dumont or French garment, said, (R. II, 895):

> "The Circuit Court of Appeals for the Sixth Circuit held that the first patent of Cunningham was invalid because of anticipation, want of invention and prior public knowledge. *Loeber Hair Goods Co. v. Gossard Co.*, 87 F. 2d 98, decided before suit was filed in this case. That decision is based partly upon what is referred to in the record as the French garment. This was said to have been imported in 1930, and was in the possession of appellee at the time depositions were taken in the first case. It unquestionably exhibits everything disclosed by Cunningham. However, a sharp controversy arose in the case at bar over the credibility of the witnesses who gave the evidence with respect to the French garment. It so impressed the District Court in this case that he declined to believe their testimony, and for this reason chose not to follow the decision of the Sixth Circuit. We accept his ruling in this respect."

The Petition should be granted.

Respectfully submitted,

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